DEPARTMENT OF WILLS, EXECUTORS AND ADMINISTRATORS.

EDITOR-IN-CHIEF,
HON. WILLIAM N. ASHMAN,
Assisted by
HOWARD W. PAGE, CHARLES WILFRED CONARD,
JOSEPH HOWARD RHOADS, WILLIAM HENRY LLOYD, Jr.,
EDWARD BROOKS, Jr.

ELLISON'S ESTATE.[1] ORPHANS' COURT OF PHILADELPHIA CO., PENNSYLVANIA.

An executor's account was filed in November, 1881, and confirmed absolutely in January, 1882. On April 3, 1893, one of the *cestui que trusts* filed a petition for review. All the evidence alleged in support of the petition was accessible to the petitioner in 1881, and was then considered and made the subject of certain action agreed to between the accountants and the trustee for petitioner's sister, who was another of the *cestui que trusts*. These facts although known in 1881 to the petitioner's trustee, who was also one of the accountants, were not actually brought home to her until 1893. It was not alleged that any fraud was practiced against petitioner's sister. *Held*, that the petitioner was barred by laches.

THE TIME LIMIT IMPOSED UPON BILLS OF REVIEW IN PENNSYLVANIA UNDER THE ACT OF 1840, WITH SOME CONSIDERATION OF THE PROCEDURE IN OTHER STATES.

Where a decree has been made by the Orphans' Court confirming the account of an executor, administrator or guardian, no distribution having taken place under such decree, the Orphans' Court has power under the Act of October 13, 1840, to entertain a bill of review to correct such account, even though five years have elapsed between the confirmation of the account and the petition for review. In support see *George's Appeal*, 12 Pa. 260 (1849); *Gillen's Appeal*, 8 W. N. C. 499 (1880); *Lightcap's Estate*, 29 Pitts. Leg. Jour. 373

[1] Reported in 13 Pa. C. C. Rep. 410.

(1882); *contra*, *Riddle's Estate*, 19 Pa. 433 (1852); *Kinter's Appeal*, 62 Pa. 322 (1869); *Jones's Appeal*, 99 Pa. 129 (1881).

Prior to the Act of 1840, the power of the Orphans' Court to entertain bills of review was subject to no limitations other than such as arose in the discretion of the court, from the circumstances of the particular case in which the bill of review was sought. The remedy is part of a general equitable jurisdiction exercised by the Orphans' Court, and derived from the practice of the Court of Chancery. The nature of the discretion exercised by the Orphans' Court in proceedings upon bills of review is clearly shown in *Briggs's Appeal*, 5 Watts. 94 (1836), where Justice Sergeant said:

"The Orphans' Court, in analogy to the practice of chancery, has power, by a proceeding or petition in the nature of a bill of review, to correct an account, after confirmation, for errors apparent on its face, or new matter discovered since. Great injustice might take place if this power were denied them. At the same time it is requisite that this discretion be exercised with great caution, and only within a reasonable time, otherwise accounts never would be at rest."

In this case it was held that the Orphans' Court, in the exercise of its discretion, had power to order a review of a guardian's account, although five years had elapsed since confirmation on the ground of his omission to account for money received—the omission having been newly discovered.

Following the decision in *Briggs's Appeal*, the Pennsylvania *Act of October 13, 1840*, was passed (§ 1, P. L. 1; Br. Purd., 1286, § 61), providing that:

"*The judges of the Orphans' Court* of the Commonwealth of Pennsylvania, *within five years after the final decree, confirming the original or supplementary account of any executor*, administrator or guardian, which has or may be hereafter passed as aforesaid, *upon petitition of review being presented by such executor*, administrator or guardian, or their legal representatives, or by any person interested therein, *alleging errors in such account*, which errors shall be specifically set forth in said petition of review, and said petition and errors being verified by oath or affirmation; said Orphans' Court *shall grant a rehearing of so*

much of said account as is alleged to be error in said petition of review and give such relief as justice and equity may require, by reference to auditors, or otherwise; with like right of appeal to the Supreme Court as in other cases, except that the appeal shall be taken under the provisions of this Act, within one year after the decree made on the petition of review:

"PROVIDED, *That this Act shall not extend to any cause where the balance found due shall have been actually paid and discharged by any executor, administrator or guardian.*"

"The judges of the Orphans' Court . . . within five years . . . shall grant a rehearing:" *Act of Oct. 13, 1840.*

This language is capable of two constructions: (1) Either that the parties in interest must bring their bill of review *within five years or not at all;* (2) Or, that it is *obligatory* upon the court to grant a rehearing *within five years*, and, *in its discretion*, to grant or refuse such rehearing *after five years.* In either event, under this latter construction, the parties in interest *have the right to present their petition for review.*

On the one hand, the Supreme Court, in the cases of *Riddle's Estate* and *Jones's Appeal*, refers to the Act of 1840 as fixing a limitation to petitions of review, and Justice Sharswood, in *Kinter's Appeal*, said: "The object of that Act (1840) seems to have been to make a bill of review in the Orphans' Court a matter of right, and, at the same time, prescribe a limitation of time to the exercise of the power."

On the other hand the court, in *George's Appeal*, declared the limitation of five years applicable only "to reviews of alleged errors in the settled accounts of executors, etc."

In *Gillen's Appeal*, the court said: "The Act of October 13, 1840, is an enlarging, not a restraining statute." And, further: "The only effect of that Act (1840) was to make it peremptory on the court to grant the review in the cases within the purview, with the proviso that it should not apply to any case where the balance shall have been actually paid by the executor or administrator."

And in *Lightcap's Estate* Justice Green held that the Orphans' Court had discretionary power to correct its own errors by petition of review outside of the provisions of the Act of 1840.

Weitting v. *Nissley*, 6 Pa. 143 (1847), was decided under the proviso of the Act.

The court said: "In the present case the account was confirmed on the 12th of February, 1839, and by the decree of the Orphans' Court made, the account must be regarded as the final account, on the authority of *Bowers's Appeal*, 2 Barr. 432, and not having been appealed from within three years, nor a review asked for within five years, it is final and conclusive; and should there be errors in the account, as is alleged, they cannot be corrected either in the present form of proceeding, or by a petition for a review.

"Whatever may have been the practice in relation to opening and correcting such accounts, and the time during which it would be allowed, we regard the question now settled by the Act of October 13, 1840.

"By the Act of March 29, 1832 (Purd. 885), the Orphans' Court is declared to be a court of record, with all the qualities and incidents of courts of record at common law . . . and by the Act of October 13, 1840, relating to Orphans' Courts, a review may be granted in a proper case made out within five years after the final settlement of account. . . . These acts, whilst they give to the vigilant every means of redress necessary for their protection, fix a period when all litigation is at an end."

In this case there had been a final accounting and payment by the administrator and releases in full delivered to him by appellant.

In *White's Estate*, 49 Leg. Int. 286 (1892), the court said: "The Act of Assembly is explicit that a review shall not be granted after a fund is distributed."

In *George's Appeal*, 12 Pa. 260 (1849), the court said: "The Orphans' Court has from the beginning exercised the power of reviewing and modifying its proceedings and decrees, as an authority necessarily inherent and essential to the right discharge of its duties. On this point no statutory direction was given till the *Act of October, 1840, which, however, is confined to reviews of alleged errors in the* SETTLED ACCOUNTS *of executors, administrators and guardians. This limits the period*

within which a review may be had in such cases to five years, but it leaves untouched the pre-existing practice in all other instances. Being thus unrestrained by the written law, I see no objection to the liberal exercise of the right to rehear and redress for the correction of manifest mistake involving injury, tempered, however, by the application of a sound discretion, seeking to protect the rights of third persons, and which, in most cases, would dictate a refusal to interfere when the relative position of the original parties was materially changed, or the interests of third persons might be put to hazard. In estimating such a contingency, the time which had elapsed since the decree complained, would, of course, enter largely into the consideration of the court; and where this was much extended, might of itself afford a sufficient objection to bar the prayer for relief. It is said that, in England, in the time of Lord Guildford, there was no limitation for a bill of review: *Fetton* v. *Moccleſfield*, 1 Veru. 287; though in *Goddard* v. *Goddard*, Ch. Rep. 139, it was not permitted sixteen years after a decree, and it now seems to be the rule not to reverse on review after twenty years, except for very apparent error." . . . "Should it become necessary with us to fix the time within which a review may be granted, the period will probably be much abridged by reference to our Acts of 1791, prohibiting writs of error after seven years, or, it may be, to the Act of 1840, just mentioned."

In *Riddle's Estate*, 19 Pa. 433 (1852), Lewis, J., said:

"*The Act of October 13, 1840, which fixes a limitation to petitions of review*, directs the court to 'give such relief as justice and equity may require.' This may be understood as adopting the principles of equity which had heretofore governed Courts of Chancery in applications of this kind. It was certainly not the intention of the Legislature to keep litigation on foot for a longer period than necessary for the purposes of justice; or to nullify the solemn decisions of the courts at the mere will and pleasure of any party who chose to demand a rehearing, within five years, upon the same questions of fact which had been fully heard and decided on the first trial. To allow this to a party who cannot allege any error in *law*

on the face of the decree, or that he has discovered any new evidence, or that any new matter has arisen, would be contrary to the maxim that 'no one shall be twice vexed for the same cause,' and would not be administering 'justice' or 'equity.'"

This case decides that a review could only be had as a matter of right in two cases: (1) For error of law appearing in the body of the decree; (2) For new matter which has arisen subsequent to the decree.

In *Kinter's Appeal*, 62 Pa. 322 (1869), Sharswood, J., said:

"Nor in our opinion does the proviso of the *Act of October 13, 1840*, § 1, Pamph. L. 1, apply. *The object of that Act seems to have been to make a bill of review in the Orphans' Court a matter of right, and at the same time prescribed a limitation of time to the exercise of the power.* It was probably passed in consequence of the decision of this court in *Briggs's Appeal*, 5 Watts, 91, where, in a case like that before us, it was held that the Orphans' Court, in the exercise of its discretion, had power to order a review of a guardian's account, on the ground of money having been received by him and not accounted for, the omission having been newly discovered. "At the same time," said Mr. Justice Sergeant, "it is requisite that this discretion be exercised with great caution, and only within a reasonable time; otherwise accounts never would be at rest." We must construe the Act of 1840 in the light of the old law, the mischief and the remedy. It never could have been the design of the Legislature to provide that where an accountant had failed to charge himself with money for which he was liable to account, that the payment of the balance should preclude a re-examination. We must give the law a reasonable interpretation—one in accordance with its spirit, and not its letter. The body of the Act expressly declares that the court shall "give such relief as justice and equity may require." In a great majority of cases this could not be done if the payment of the balance was a bar to all inquiry. Such a rule would be a cover to the grossest frauds purposely concealed. It was meant as a shield to the honest accountant, not as a weapon in the hands of the dishonest to perpetrate

iniquity. Its evident purpose was that the decree should never be disturbed so as to do injustice to the accountant. If under it he had paid over money he ought to be protected in that payment, even though it should subsequently appear to have been wrongful. *Whenever, therefore, the object of the review is to surcharge the accountant with money received by him, not accounted for, and, therefore, not at all included in the decree, and not to disturb an appropriation already decreed and consummated by payment, the proviso of the Act of 1840, is not in the way of the proceeding.*"

This case decides that the proviso of the Act of 1840 applies to accounts confirmed by decree and consummated by payment, and not to an attempt to surcharge an accountant with money received by him and not accounted for, and therefore not included in the decree of the court. Justice Sharswood's comments upon the object of the Act of 1840, beyond the decision as to the meaning of the proviso as above, were not in any manner necessary to the decision of the case, and must, therefore, be regarded as mere dicta.

In *Bucknor's Estate*, 7 W. N. C. 471 (1879), the court said: "It must be conceded that the petition could not be supported under the Act of October 13, 1840. But the power of the Orphans' Court to correct or amend its decrees when injustice will result by suffering them to stand, does not depend entirely upon this Act; and where no rights have changed in consequence of the decree, this power of correction or amendment will be liberally exercised, notwithstanding the fact that error does not appear on the face of the record, or that new matter is not averred or shown."

In *Gillen's Appeal*, 8 W. N. C. 499 (1880), the court said: "Power to grant a bill of review has always been a well-established branch of the authority of a Court of Chancery, and has been exercised by the Orphans' Court: *Briggs's Appeal*, 5 Watts. 91.

The Act of October 13, 1840, is an enlarging, not a restraining statute.

Excepting under certain circumstances, the court *shall* grant a bill of review: *George's Appeal*, 2 Jones, 262; *Bishop's*

Estate, 10 B. 471; *Pennypacker's Appeal*, 1 Leg. Gaz. R. 484.

On appeal, the Supreme Court, in the course of their opinion, said: "Undoubtedly, prior to the Act of October 13, 1840, the Orphans' Court might entertain a petition of review in cases in which Chancery Courts were in the practice of so doing. *The only effect of that Act was to make it peremptory on the court to grant the review in the cases within the purview, with the proviso that it should not apply to any case where the balance shall have been actually paid by the executor or administrator.*"

In *Littleton's Appeal*, 93 Pa. 181, the court said: "In New York it is held that a bill of review cannot be brought after the time allowed for an appeal: *Boyd* v. *Vanderkemp*, 1 Barb. Ch. R. 273. Perhaps in this State it would be wise to follow the rules established by the Legislature as to reviews of final decrees confirming the original or supplementary account of any executor, administrator or guardian, by the Act of October 13, 1840, § 1, Pamph. L. 1841, pl. 1, which is five years. This, however, would be only by analogy, for it is clear that the Act of 1840 is not directly applicable. Yet in *George's Appeal*, 2 Jones, 262, Mr. Justice Bell says, 'should it become necessary with us to fix the time within which a review may be granted, the period will probably be much abridged by reference to our Act of 1791, prohibiting writs of error after seven years' (now reduced to two years by Act of April 1, 1874, Pamph. L. 50), or it may be the Act of 1840 just mentioned."

In *Jones's Appeal*, 99 Pa. 129 (1881), the court said: "*The Act of October 13, 1840, not only gives the right of review to a party in interest upon proper showing, but fixes a limitation to petitions of review. . . . Whether the review is demanded for error in law apparent in the decree, or for new matter which has arisen after the decree, or for new proof that has come to light since the decree, the statutory limit applies.*"

In *Milne's Appeal*, 11 W. N. C. 332 (1882), the court said: "We have no doubt about the power of the Orphans' Court to revise and correct its former adjudications, if in those adjudications it discovered a palpable mistake, produced either

by its own inadvertence or by the blunder of the parties. A sense of fair dealing and justice would be authority enough, in the absence of any other, for so holding. Nevertheless, other authority will be found, and that directly in point, in *Genge's Appeal*, 2 Jones, 260, where the subject is so fully discussed that further argument from us is unnecessary."

In *In re Estate of G. C. Lightcap, Sr., deceased*, 29 Pitts. Leg. Jour. (O. S.) 373 (1882), 99 Pa. 74, the Supreme Court, in an opinion by Green, J., said: "*It cannot be doubted that the court below had ample power to correct the error of its original decree, either under or independently of the Act of October 13, 1840.* Nothing had been done under the decree, and if it was erroneous it ought to be corrected in the interest of justice and by the court that made it. We held in *Parker's Appeal*, 11 P. F. Smith, 478, that the Orphans' Court under the Act of October 13, 1840, might entertain a bill of review, notwithstanding a decree of affirmance by the Supreme Court. *The discretionary power of the Orphans' Court to correct its own errors by petition of review, outside of the provisions of the Act of 1840, has been affirmed in the cases of Gillen's Appeal, 8 W. N. C. 499, and Whelan's Appeal, 20 P. F. Smith, 410, and is manifest upon plain principles applicable to the power of all courts over their own decrees.*"

Rhone's Orphans' Court, Pr. Vol. 1, p. 645, says: "The object and purpose of the Act of October 13, 1840, was to establish as a matter of right what had been before construed by the courts as matters of grace, and to limit the time for the inquiry and examination of accounts to five years after their final confirmation:" *Ellison's Estate*, 13 C. C. R. 410 (1893).

In this case an executor's account was filed in 1881 and confirmed absolutely in 1882. In 1893 one of the *cestui que trusts* filed a petition for review. *Held*, that under the evidence the petitioner was barred by laches.

In the course of his opinion, Judge Ashman said: "The rule is that laches will bar a suitor of his remedy as effectually as the statute of limitations, and for the same reason, his own inaction raising the identical presumption which the law raises out of mere lapse of time. In recognition of this rule the Act

of October 13, 1840, limited the period within which, as a matter of right, a bill of review can be had to five years from the date of the final decree. Among cases not within the Act, where relief has been sought as a matter of grace, and has been refused upon the ground of laches, we may refer to *Baggs's Appeal*, 43 Pa. 512; *Milligan's Appeal*, 82 Pa. 389; and *Scott's Appeal*, 112 Pa. 427."

The foregoing examination of the Pennsylvania authorities on this subject shows how decided a preponderance exists in the decisions of our Supreme Court in favor of a liberal interpretation of the Act. This power of review, which any other construction of the Act of 1840 than the one here contended for would materially and arbitrarily curtail, is one of the most delicate and important among those entrusted to the Orphans' Court in its equitable jurisdiction over decedents' estates.

Prior to the Act of 1840, the question as to the period of time which by its lapse would constitute a bar to review, was entrusted to the discretion of the court, to be determined by all the circumstances of the case, and the discretion thus vested in the Orphans' Court had always been guardedly and equitably exercised.

The intent of the Legislature in the passage of this Act could never have been to limit to the short term of five years the exercise of a power which, prior thereto, the court had equitably administered after a lapse of twenty years. Apart from the authorities, a consideration of the causes for which bills of review are filed, and of the injustice which so narrow a limitation of the power would produce, will convince that such was not the purpose of the Act.

The end sought by the Legislature was plainly to secure the privilege of review as a matter of right demandable by the parties in interest within the period of five years, and demandable thereafter subject, as formerly, to the equitable discretion of the court.

And this conclusion to which these considerations so clearly point is borne out and confirmed by the opinions of the Supreme Court in *George's Appeal*, *Gillen's Appeal* and *Lightcap's Estate*.

In *Jackson* v. *Jackson*, 144 Ill. 274 (1893), one of the points

involved in the case was the question under discussion, the bill of review being brought to vacate a decree in a partition proceeding. Justice Craig, in delivering the opinion of the Supreme Court of Illinois, said: "The next question presented is, whether the complainants or either of them have lost their right to bring this bill by lapse of time. As has been seen, the decree was rendered on April 6, 1883, and this bill was brought on August 20, 1890. No time has been prescribed by statute within which a bill of review must be brought, but writs of error are required to be sued out within five years from the time a judgment or decree has been rendered; and in analogy to the time prescribed for prosecuting writs of error, it has been held that a bill of this character should be brought within the time allowed for suing out a writ of error: *Lyon* v. *Robbins*, 46 Ill. 278." And the same view was taken in the case under consideration.

In the case of *Thomas* v. *Harvie's Heirs*, 10 Wheaton, 143 (1825), this question was considered by Mr. Justice Washington in rendering the decision of the Supreme Court of the United States. This was an appeal from the Circuit Court of Kentucky. The appellant filed in 1818 a bill to review and reverse a final decree of the same court pronounced in 1810. The Supreme Court said: "The record shows that the order of court permitting the bill to be filed was granted eight years subsequent to the final decree in the original cause; and the question to be decided is, whether the remedy was not barred by length of time?"

"It must be admitted, that bills of review are not strictly within any act of limitations prescribed by Congress; but it is unquestionable that Courts of Equity, acting upon the principle that laches and neglect ought to be discountenanced, and that in cases of stale demands its aid ought not to be afforded, have always interposed some limitation to suits brought in those courts. It is stated by Lord Camden, in the case of *Smith* v. *Clay* (Ambl. 645, 3 Bro. Ch. Cas. 639, note) "that as the Court of Equity has no legislative authority, it could not properly define the time of bar by a positive rule, but that, as often as parliament had limited the time of actions and reme-

dies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity." Upon this principle it is, that an account for rents and profits, in a common case, is not carried beyond six years, or a redemption of mortgaged premises allowed after twenty years possession by the mortgagee, or a bill of review entertained after twenty years, by analogy to the statute which limits writs of error to that period.

These principles seem to apply, with peculiar strength to bills of review, in the courts of the United States, from the circumstance that Congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies by appeal, and a bill of review, so apparent that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former." And in *Central Trust Co.* v. *Grant Locomotive Works, et al.*, 135 U. S. 207 (1890), the principles laid down in *Thomas* v. *Harvie's Heirs* were adverted to and re-affirmed.

In an action of accounting a court of equity will not lend its aid to the enforcement of stale claims. In the case of *Bell et al.* v. *Hudson et al.*, 73 Cal. Rep. 285 (1887), it was held that a Court of Equity, on account of the staleness of the claim, would not entertain an action for an accounting of the affairs of a partnership, which was brought by the personal representative of one partner, twenty-five years after his death, against the personal representative of the other, when the complainant failed to account for the delay by showing that the heirs of the former partner had no knowledge of their rights, or that there was some impediment to a prior action by them.

In perhaps the majority of the States there is no statute of limitations governing such cases—certainly no such statute as the Pennsylvania Act of 1840—and the entertainment and decision of such cases is left entirely to the discretion of the Court of Equity before which they are brought. The general attitude is well set forth by Chief Justice Taney, in delivering the opinion of the Supreme Court of the United States in *McKnight* v. *Taylor*, 1 How. 168:

"In matters of account, where they are not barred by the Act of Limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscured by time and the evidence may be lost."

As stated by Davis, J., in *McQuiddy* v. *Ware*, 20 Wall. 19, "there is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances." In other words, the question is addressed to the sound discretion of the chancellor in each case. How clearly this doctrine appears in some cases is illustrated in the above-cited case of *McKnight* v. *Taylor*, where the bill was filed to adjust matters of account *which were not barred by the Statute of Limitations*, but were, nevertheless, dismissed for want of reasonable diligence.

The principle to be deduced from the cases not governed by statute seems to be that a bill of review for error apparent on the record must be brought within the time in which, at the common law, a writ of error could be brought, and that the allowance of a bill of review for after-discovered matter is wholly within the equitable discretion of the court as to the question of time, as well as in other respects.

It appears that, as a general rule, it is not allowed after the time allowed for a writ of error has elapsed since the evidence was discovered. The whole subject is one which the Legislatures of our States will do well to leave to the sound discretion of our Courts of Equity as any attempt at statutory limitation of a power so delicate, so important and so necessarily discretionary, cannot but be frequently attended with mischievous results.

H. Bovee Schermerhorn.